No. 89-1905

In the Supreme Court of the United States

OCTOBER TERM, 1990

WISCONSIN PUBLIC INTERVENOR AND TOWN OF CASEY, PETITIONERS

v.

RALPH MORTIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

DAVID C. SHILTON
KATHERINE W. HAZARD
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*) preempts the regulation of pesticide use by local units of government.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1905

WISCONSIN PUBLIC INTERVENOR AND TOWN OF CASEY, PETITIONERS

v.

RALPH MORTIER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. In September 1985, the Town of Casey, in Washburn County, Wisconsin, adopted Town Ordinance 85-1, which regulates the use of pesticides. II Pet. App. C1-C17. The ordinance requires a permit prior to application of any pesticide to public lands or private lands subject to public use, and prior to any aerial application of pesticides to private lands. II Pet. App. C6. A permit applicant must submit information concerning the proposed pesticide appli-

cation to the Town Board, at least 60 days prior to the proposed use. *Id.* at C7-C11. The Town Board may grant the permit, deny it, or grant it with "reasonable conditions * * * related to the protection of the health, safety, and welfare of the residents of the Town of Casey." *Id.* at C11-C12. The ordinance provides hearing rights for the permit applicant, or for any town resident. *Id.* at C12. If a permit is granted or granted with conditions, the permittee must post a placard giving notice of pesticide application and of any pertinent conditions. Violation of the ordinance carries a penalty of up to $5000 for each violation. *Id.* at C15-C16.

2. a. Respondent Ralph Mortier applied for a permit to spray a portion of his land with a pesticide. The Town granted him a permit, but precluded aerial spraying and limited the land area that could be sprayed. I Pet. App. 5-6.

b. Respondents brought a declaratory judgment action in the Washburn County Circuit Court claiming that the Town of Casey's ordinance is preempted by state and federal law. The Washburn County Circuit Court ruled that both state and federal law preempt the regulation of pesticides by local governments, and that Ordinance 85-1 is therefore invalid. II Pet. App. B14-B15.

c. The Supreme Court of Wisconsin affirmed in a 4-3 decision. The majority concluded that the Town of Casey's ordinance is preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*[1] Recognizing that FIFRA ex-

[1] First enacted in 1947, FIFRA was substantially revised in 1972. The 1972 amendments "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 991 (1984). Among other things, FIFRA regulates the use, sale and production of pesticides, and provides for review, cancellation, and suspension of pesticide registrations. *Id.* at 992. Congress charged the Administrator of the Environmental Protection Agency (EPA) with administering the program. 7 U.S.C. 136w.

plicitly permits state regulation of pesticides (7 U.S.C. 136v), the majority concluded that the language of the statute and its legislative history reveal Congress's "clearly manifested intent * * * to preempt any regulation of pesticides by local units of government." I Pet. App. 25.[2] The dissenting Justices concluded that the language of the statute and its legislative history were insufficient to express an intent to preempt local regulation. *Id.* at 9-25 (Abrahamson, J., dissenting); *id.* at 1-9 (Steinmetz, J., dissenting).[3]

DISCUSSION

The question whether FIFRA preempts regulation by local governments of pesticide use warrants review by this Court. The issue has led to a split among the federal courts of appeals and state courts of last resort. The question is, in addition, one of recurring significance. On the merits, the issue is close, but we conclude that Congress has not expressed an intent to preempt local regulation with sufficient clarity to establish preemption. Permitting regulation

[2] The majority declined to "address the question of whether the enactments of the Wisconsin legislature also preempt the Town ordinance" (I Pet. App. 5 n.2), and decided only the question of federal preemption.

[3] The first volume of the Petition Appendix contains the majority opinion and the two dissenting opinions; the pagination of the opinions in the Appendix is not consecutive.

by local governments of pesticide use, moreover, is entirely consistent with the purpose and operation of FIFRA.

1. Review by this Court is appropriate to resolve a conflict among various federal and state courts regarding the preemptive effect of FIFRA. In addition to the Wisconsin Supreme Court in this case, two federal courts of appeals have held that FIFRA preempts regulation by local governments of pesticide use. See *Professional Lawn Care Ass'n* v. *Village of Milford*, 909 F.2d 929 (6th Cir. 1990), petition for cert. pending, No. 90-382; *Maryland Pest Control Ass'n* v. *Montgomery County*, 822 F.2d 55 (4th Cir. 1987) (Table), summarily aff'g 646 F. Supp. 109 (D. Md. 1986).[4] In conflict with these decisions, two state courts of last resort have held that FIFRA does not preempt local regulation of pesticide use. See *Central Maine Power Co.* v. *Town of Lebanon*, 571 A.2d 1189 (Me. 1990); *People ex rel. Deukmejian* v. *County of Mendocino*, 36 Cal.3d 476, 683 P.2d 1150 (1984).[5] Indeed, several of these courts have

[4] See also *Maryland Pest Control Ass'n* v. *Montgomery County*, 884 F.2d 160, 161-162 (4th Cir. 1989) (noting that court had affirmed district court holding that local pesticide ordinances "were invalid under FIFRA" and that "FIFRA pre-empted local laws").

One lower state court has also concluded that local government regulation of pesticide use is preempted by FIFRA. *Long Island Pest Control Ass'n, Inc.* v. *Town of Huntington*, 72 Misc.2d 1031, 341 N.Y.S.2d 93 (1973), aff'd, 43 A.D.2d 1020, 351 N.Y.S.2d 945 (1974).

[5] One federal district court has also held that FIFRA does not preempt local regulation of pesticides. See *COPARR, Ltd.* v. *City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), appeal pending, No. 89-1341 (10th Cir.) (oral argument set for January 15, 1991).

noted the conflicting holdings.[6] The issue raises important questions concerning the validity of local governmental actions in an area of public safety and health, and it arises frequently. The question is ripe for review by this Court.[7]

2. On the merits, we agree with petitioners that FIFRA does not preempt local government regulation of pesticide use.

a. The framework for analyzing preemption issues is well established. As this Court recently reiterated, the "question whether a certain state action is preempted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." *Ingersoll-Rand Co.* v. *McClendon*, No. 89-1298 (Dec. 3, 1990), slip op. 3 (internal quotation marks omitted). Preemption can occur through explicit statutory provisions; through implication if the federal role is pervasive and all-encompassing; or

[6] See, *e.g.*, *Professional Lawn Care Ass'n*, 909 F.2d at 932-933 & n.2 (noting split and disagreeing with California Supreme Court's *Mendocino County* analysis); *Central Maine Power Co.*, 571 A.2d at 1193 (agreeing with *Mendocino County* and disagreeing with *Maryland Pest Control*).

[7] There is no reason to await the outcome of the appeal to the Tenth Circuit from the *COPARR* decision, note 5, *supra*. Regardless of the outcome of that decision, a conflict will be presented on this issue.

The Wisconsin Supreme Court's decision not to reach the possible state preemption ground (note 2, *supra*) also does not counsel against review. Because the court relied on federal grounds, this Court clearly has jurisdiction to review and decide the federal issue. See, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1040-1042 (1983); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-568 (1977). See also *California* v. *Ramos*, 463 U.S. 992, 997-998 n.7, 1014 (1983) (reversing with respect to the federal question and remanding the undetermined state law issue).

through a conflict between state law and federal law. *English* v. *General Electric Co.*, 110 S. Ct. 2270, 2275 (1990). "[T]he historic police powers of the States [are] not to be superseded" by federal legislation "unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Moreover, the same principles govern with respect to challenges to local, as opposed to state, ordinances. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); see also *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Finally, reluctance to infer preemption is especially strong where, as here, the state or local regulation relates to health and safety issues which have been, "primarily and historically, a matter of local concern." *Hillsborough*, 471 U.S. at 719.

b. The Wisconsin Supreme Court concluded that Congress's "clearly manifested intent" was to preempt local regulation of pesticide use. I Pet. App. 25. It concluded that the statutory language, "coupled with the legislative peregrinations of the pesticide bill, unmistakably demonstrates the intent of [C]ongress to preempt local ordinances such as that adopted by the Town of Casey." I Pet. App. 22. In our view, however, neither the statutory language nor the legislative history is sufficiently clear to establish preemption.[8]

[8] The dissenting Justices observed that "[t]he majority opinion does not fit into the traditional preemption analysis" of three categories (express, implied, and conflict), and that "[t]he majority opinion apparently attempts to find express preemptive intent not in the text of the statute but in legislative history." I Pet. App. 9 n.3 (Abrahamson, J., dissenting). Cf. *Professional Lawn Care Ass'n*, 909 F.2d at 933 (noting that "FIFRA does not preempt the village ordinance by its express terms" and that "[o]ur analysis of FIFRA and its legislative history leads us to conclude that when Congress rewrote the statute, it impliedly preempted the local regulation of pesticides.").

The statutory language itself plainly is inadequate to warrant a conclusion of preemption. Indeed, the state court both finds the statutory language "ambiguous" (I Pet. App. 15) and relies extensively on that language (*id.* at 22-25). The particular statutory provisions, however, fail to convey the meaning ascribed to them.

The state court places great weight on the specific authorization to States to regulate pesticide use. I Pet. App. 22-23. Section 24(a) of FIFRA specifically provides that a "State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." 7 U.S.C. 136v(a). The state court concludes that, "[f]rom this alone, it is possible to infer that regulation by other governmental entities not protected from preemption * * * is preempted." I Pet. App. 23. This explicit authorization of state regulation, however, does not require the conclusion that local governments are preempted from regulating pesticide use. Indeed, as the California Supreme Court pointed out, it is entirely plausible to read the provision as leaving the allocation of regulatory authority to the discretion of each State, including the possible allocation of authority to local governments. See *Mendocino County*, 683 P.2d at 1159-1160.[9]

[9] For the same reason, the fact that the definition of "State" in FIFRA (7 U.S.C. 136(aa)) does not specifically include local governments also does not establish a plain statement of preemptive intent. See *Mendocino County*, 683 P.2d at 1158.

Even if there is a distinction between the authority given to States by Section 24(a) and the authority of local governments, moreover, the state court's corollary—that local governments have *no* authority to regulate pesticide use—does not properly follow. For, even if Section 24(a) confers some regulatory authority on the States that might otherwise be considered preempted as inconsistent with, or repugnant to full effectuation of, the federal program, that does not mean that Congress otherwise sought to occupy the entire regulatory field. Thus, Congress's omission of local governments from the affirmative authorization of Section 24(a) would mean that local government ordinances are subject to the usual preemption analysis given to such local ordinances (see, *e.g.*, *Hillsborough*, *supra*), rather than the terms of the special statutory authorization given to States under Section 24(a) (explicitly permitting state action that is not "prohibited by this subchapter").

Nor, contrary to the state court's suggestion, does the express reference to political subdivisions and local agencies in other sections of FIFRA demonstrate that Congress intended to exclude local governments from regulating pesticide use, or even from the authorization conferred by Section 24(a). Indeed, the opposite conclusion may well be appropriate. Section 8(b) requires manufacturers to produce records for inspection "upon request of any officer or employee of the Environmental Protection Agency or of any State or political subdivision, duly designated by the Administrator." 7 U.S.C. 136f(b). Section 23(a), in turn, authorizes the Administrator to enter into cooperative agreements with "States" to "delegate to any *State* * * * the authority to cooperate in the enforcement of [the Act] through the use of its personnel." 7 U.S.C. 136u(a) (emphasis added). It is apparent that "State" as used in Section 23(a) necessarily includes political subdivisions, since Section 8(b) makes clear that political subdivisions may be designated as inspectors. As pointed out by the concurrence in *Professional Lawn Care Ass'n*, if "State" includes political subdivisions in Section 23 of the Act, "it can hardly be a forgone conclusion" that "State" excludes political subdivisions where it appears in Section 24. 909 F.2d at 936-937.[10]

c. With respect to FIFRA's legislative history, indications of congressional intent on preemption present a close question. Although there are some strong and directly relevant committee statements favoring preemption of local regulation, the legislative history does not point entirely in one direction, and, in our view, does not demonstrate that Congress "unmistakably * * * ordained" preemption of all local regulation. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963).

In this case, the Wisconsin Supreme Court focused principally on three aspects of the legislative history —the House Committee on Agriculture report, the Senate Committee on Agriculture and Forestry report, and a conflict between the Senate Committee on Agriculture and Forestry and the Senate Committee on Commerce. I Pet. App. 16-22. We shall discuss each in turn.

---

[10] Other sections of FIFRA also direct the Administrator to cooperate with local governments in carrying out various provisions of the statute. See 7 U.S.C. 136r(b) and (c), 136t(b). These provisions plausibly support the conclusion that Congress expected local governments to play a significant role in regulating pesticides; they certainly do not reveal a manifest intent to preempt local regulation of pesticide use.

The House Committee on Agriculture report states that "[t]he Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 states and the Federal Government should provide an adequate number of regulatory jurisdictions." H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971). Although a decision not to authorize regulation is not necessarily coextensive with a decision to preempt (see also our discussion of the statutory text, page 8, *supra*), the House Committee report may be read to provide some evidence of congressional opposition to local regulation of pesticides.[11]

The Senate Committee on Agriculture and Forestry contains a more emphatic statement. Its report declares that the Committee "considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives." S. Rep. No. 838, 92d Cong., 2d Sess. 16 (1972).[12]

[11] It is also possible that, as the California Supreme Court concluded, the House report should be given a more limited reading. See *Mendocino County*, 683 P.2d at 1160 ("The report of the House Committee on Agriculture did not state that political subdivisions should be prohibited from regulating but only that they should not be authorized to regulate. This is consistent with the ordinary view that states are free to distribute regulatory power between themselves and their political subdivisions.").

[12] The Senate Committee report further states:

> Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.

S. Rep. No. 838, *supra*, at 16-17.

Thus, if the Senate and House Agriculture Committee reports on the bill were the only evidence of congressional intent, the issue would be whether these statements should be given effect even though the statutory language did not itself clearly express a congressional intent to preempt local regulation.

The Senate Commerce Committee also had jurisdiction over the bill, however, and its role suggests that Congress contained conflicting views on local regulation of pesticide use. The Commerce Committee noted that, "[*w*]*hile the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides*, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner." S. Rep. No. 970, 92d Cong., 2d Sess. 27 (1972) (emphasis added). The Commerce Committee was particularly concerned because "[m]any local governments now regulate pesticides to meet their own specific needs which they are often better able to perceive than are State and Federal regulators." *Ibid.* The Commerce Committee therefore proposed an amendment explicitly authorizing local regulation of pesticides; after intense negotiations with the Senate Agriculture Committee about numerous amendments, the amendment was not

adopted. The Commerce Committee, however, never disavowed its view that the bill itself did not preempt local regulation.

As a result of these competing strains in the legislative history, Justice Abrahamson's conclusion in her dissenting opinion below—that the "members of both Senate committees agreed to disagree on the issue of preemption of local regulation" (I Pet. App. 20 (dissenting opinion))—is an entirely plausible reading of the legislative record.[13] Contrary to the majority's suggestion (I Pet. App. 21), moreover, the fact that an Agriculture Subcommittee chairman reiterated the Senate Agriculture Committee's view to the limited extent of merely inserting it into the Congressional Record does not establish that this view was shared by the Commerce Committee, which also had jurisdiction over the bill, or by the Senate as a whole.[14]

Thus, although the legislative history contains strong evidence of a desire by at least some Members of Congress to preempt all local government regulation, that view clearly was not uniform. This

[13] See also *Mendocino County*, 683 P.2d at 1161 ("The history of the Senate proceedings establishes only that there was a compromise and that under that compromise the Committee on Commerce's intention to authorize local government regulation was rejected. The act provides a 'state' may regulate, which would ordinarily be interpreted as permitting the states to delegate their power, and nothing in the compromise explanation precludes such delegation."); *Central Maine Power Co.*, 571 A.2d at 1193 (agreeing with *Mendocino County* reading of legislative history).

[14] The state supreme court incorrectly suggests that "the full Senate * * * rejected the amendment proposed by the Senate Commerce Committee." I Pet. App. 20. See *id.* at 22 (Abrahamson, J., dissenting).

disagreement—coupled with the lack of a clear statement of preemption in the statutory text and the powerful presumption against inferring preemption of local government authority in matters of public safety and health—persuades us that insufficient evidence exists of a "clear and manifest purpose" (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230) to deprive local governments of the ability to regulate the use of pesticides.

3. The purpose and operation of FIFRA, moreover, do not require federal preemption of local regulation of pesticide use. Properly viewed, FIFRA establishes a regulatory partnership between federal, state and local governments. Section 22(b) expressly recognizes this multi-level approach by directing the Administrator to "cooperate with * * * any appropriate agency of any State or any political subdivision thereof, in carrying out the provisions of this Act, and in securing uniformity of regulations." 7 U.S.C. 136t(b). As this provision recognizes, not all environmental problems are best addressed by exclusively federal solutions, or even by statewide programs. Some may more appropriately be addressed by a regulatory system characterized by a set of basic federal standards that States may supplement, either by their own regulations or by local regulations adopted within the framework of appropriate state delegation.[15]

[15] The state supreme court also cited, as support for its conclusion, an EPA statement issued in 1975. I Pet. App. 25-26. This reliance is misplaced. The quoted language is from the preamble to EPA's final rule regarding approval of state plans for certification of pesticide applicators. 40 Fed. Reg. 11,700 (1975). This rule pertains to a different section of FIFRA, 7 U.S.C. 136i(a)(2), in which Congress authorized States to develop applicator certification plans—

To be sure, an exclusively federal approach is necessary in certain areas of pesticide regulation. One such area is labeling. Due to the burden on commerce that would be imposed by different labeling requirements in States and localities across the country, Congress clearly preempted all but federal regulation. See 7 U.S.C. 136v(b). With respect to the use of pesticides, however, the ability of local governments to exercise discretion in enacting specific controls is an essential part of the overall federal/state regulatory framework. As petitioners correctly note (at 39-40), this framework is an integral part of the Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642. Those Amendments require States to develop programs to protect wellhead areas from contaminants (which include pesticides, 42 U.S.C. 300f(6)), and to "specify the duties of State agencies, local governmental entities, and public water supply systems with respect to the development and implementation of [the] programs." See 42 U.S.C. 300h-7(a)(1). Under the ruling below, local governments could be substantially hampered in playing their intended role in protecting groundwater recharge areas from pollution by pesticides. Cf. EPA Office of Ground-Water Protection, *Protecting Ground-Water: Pesticides and Agricultural Practices* 3 (1988) (recognizing importance of

---

not to state regulation of "the use" of pesticides authorized by Section 24. The purpose, scope, and specific provisions of the applicator certification plan procedure are entirely different from the general issue concerning local regulation of pesticide use presented by this case. To the extent that the EPA statement in the preamble is subject to a broader reading, the language could have been more precise; EPA's position, in any event, is that local governments are not preempted from regulating pesticide use.

local governments in addressing problem of pesticide contamination of groundwater).

4. In sum, the FIFRA preemption question presented in this case warrants review because it is an important and recurring issue on which federal and state courts are in conflict. Although the preemption issue is not without difficulty, it is our view that Congress has not established with requisite clarity an intent to preempt all local government regulation, particularly in a field involving safety and health and a context in which a local governmental role furthers the overall structure and purpose of the federal statutory program.[16]

---

[16] We do not suggest granting certiorari on the second question presented by petitioners, involving a Tenth Amendment issue. Unlike the FIFRA preemption issue, the Tenth Amendment issue has not been well developed, either in this case or in other cases concerning local regulation of pesticide use. Unlike the FIFRA preemption issue, moreover, there is no split of appellate authority concerning the Tenth Amendment question. See generally *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256 (1985).

We also see no need to grant the later-filed petition in *Village of Milford* v. *Professional Lawn Care Ass'n*, No. 90-382. Petitioner in that case urges the Court to grant in both cases on the ground that *Professional Lawn Care Ass'n* presents an issue of a regulation concerning notice, rather than use. Pet. 18. The court of appeals rested its holding in that case on the ground that the regulation concerned use, and thus the issue presented by the court of appeals' holding is basically the same as the issue presented by this case. 909 F.2d at 932. If the petition in this case is granted, it would be appropriate to hold the petition in *Professional Lawn Care Ass'n* and dispose of it in light of the decision here.

CONCLUSION

The petition for a writ of certiorari should be granted with respect to the first question presented in the petition.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

RICHARD B. STEWART
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

DAVID C. SHILTON
KATHERINE W. HAZARD
Attorneys

DECEMBER 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282081 20261